the Supreme Court of the United States

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 937

STATE TAX COMMISSION OF THE STATE OF ARIZONA, PETITIONER,

vs.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent, The Murray Company of Texas, Inc., and presents this brief in opposition to the Petition For Writ of Certiorari filed herein by the Petitioner, State Tax Commission of the State of Arizona.

QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the "Question Presented for Review" sets forth a purely academic question. This Court will be concerned only with the particular fact situation presented by the record herein. For that reason we believe that the "question presented for review" can be more precisely stated as follows:

May the State of Arizona exact from Respondent a tax upon the privilege of engaging in the business of

selling tangible personal property at retail which is measured by unapportioned gross receipts derived from sales exclusively in interstate commerce, consummated outside the State of Arizona, where the only activity of Respondent within the State incident to sales of its cotton gins and steel buildings is the solicitation thereof by a single representative residing in the State and assistance rendered in the assembling of gins and buildings which are delivered in a "knocked down" condition.

STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner is misleading, particularly in that it attempts to confuse the activities of Food Machinery and Chemical Corporation with the activities of Respondent. The facts involved in this action are set forth in the Stipulation entered into between the parties (Appendix A-1) and the Findings of Fact entered by the trial court (Appendix A-6). Since both the Stipulation and the Findings of Fact are brief, rather than lengthen this presentation with a restatement of their contents, we respectfully urge the Court to review them. It will be noted that the Arizona Supreme Court did not question the Findings of the trial court. A summary of the facts will be found in the Arizona Court's opinion. *State Tax Commission v. Murray Company of Texas, Inc.*, 87 Ariz. 268, 350 P. 2d 674 (1960).

ARGUMENT

Petitioner does not contend that the decision of the Supreme Court of Arizona herein conflicts with any

decision of this Court. It is conceded that the opinion of the Arizona Court is not inconsistent with *Robbins v. Shelby County*, 120 U. S. 489 (1887); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327 (1944); *Norton Company v. Department of Revenue*, 340 U. S. 534 (1951); and *Field Enterprises v. State*, 352 U. S. 806 (1956). We submit that *Norton* fully and completely supports the decision of the Arizona court and precludes a contrary determination. This is clearly demonstrated by a comparison of the statements of this Court in *Norton* with the record herein:

Norton: "But when, as here, the corporation has gone into the state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature. * * * This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market. On this record no other source of the customary relationship is shown."

Record: "During the period involved herein plaintiff did not, in the state of Arizona: (a) maintain a local retail establishment; (b) sell to customers in the state of Arizona items maintained in stock by plaintiff in the state of Arizona; (c) maintain an office which was rendering services to local custom-

ers which were factors in establishing and holding its Arizona market;" (Appendix, A-8)

Norton: "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth case."

Record: "During the period involved herein plaintiff approached the Arizona market through solicitors only." (Appendix A-8)

Norton: "Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, Cooney vs. Mountain States Tel. & Tel. Co., 294 U. S. 384, 79 L. Ed. 934, 55 S. Ct. 477, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

Record: "During the period involved herein, plaintiff did not, in the state of Arizona: * * * (d) elect to localize itself in the Arizona market with the advantages of a retail outlet in the state; (e) channel business through a local outlet to gain the advantage of a local business. 7. Plaintiff's transactions described in the aforesaid stipulation were interstate in nature and not associated with any local business being conducted by plaintiff in the state of Arizona." (Appendix A-8)

Petitioner treats as Respondent's the activities of Food Machinery & Chemica. Corporation in holding

on consignment and selling repair parts manufactured by Respondent. The legal significance of Food Machinery's activities was determined, as a matter of state law, by the Arizona Court, as follows:

> "We believe it to be the general law that a consignee of goods sold on consignment is the agent of the consignor, however, unless otherwise agreed, it is a limited agency only for the purpose of selling the merchandise furnished it on consignment, which is generally held to be insufficient to constitute doing business in the state by the consignor." (350 P. 2d 677)

By this clearcut ruling it is established that the separate and independent activities of Food Machinery in the sale of repair parts are not the activities of Respondent and that such activities do not bring Respondent within the jurisdiction of the State of Arizona for any purpose.

With respect to Respondent's activities in the assembling of cotton gins and steel buildings, the Arizona Court stated:

> "The fact that it was necessary to ship both gins and houses knocked down and had to be assembled and installed at the site where it was to be used, and required experts to assemble and install them does not in itself convert it into an intrastate transaction. Nor does the fact that the contract of purchase provides that when requested by the purchaser to do so the plaintiff will provide an expert to supervise the assembly and installation of the gins at purchaser's expense make it intrastate in character; neither does the fact that the expert was an employee of plaintiff and lived in Arizona make it intrastate. Until such machinery is assembled and installed it

is incapable of application to the use for which it was manufactured. The work of assembling and installing and the cost thereof is of comparative insignificance to the cost of manufacturing it." (350 P. 2d 677)

The foregoing portion of the Arizona Court's opinion is undoubtedly predicated upon *Weber Showcase & Fixture Co. v. Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936) wherein the Arizona Court followed and applied the rule laid down by this Court in *York Manufacturing Co. v. Colley*, 247 U. S. 21 (1918). The conclusive effect of the *York* decision in questions involving the taxing power of the states is recognized in *Gross Income Tax Division v. Surface Combustion Corp.*, 232 Ind. 100, 111 N. E. 2d 50 (1953) Cert. denied 346 U. S. 829; *Riley Stoker Corp. v. State Tax Commission*, 3 Utah 2d 164, 280 P. 2d 967 (1955); *Creamery Package Mfg. Co. v. State Board of Equalization*, 62 Wyo. 265, 166 P. 2d 952 (1946).

Petitioner states that this Court "has in recent years followed a continuing trend attempting to clarify taxing rights under the interstate commerce clause", and cites, among others, the recent cases of *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U. S. 458 (1959) and *Scripto v. Carson*, 362 U. S. 207 (1960). Petitioner contends, in effect, that this "trend" compels a decision in its favor. We submit that the correct disposition of the Petition For Writ of Certiorari herein does not depend on the continuation of any such "trend" and that the principles established in *Norton* are decisive. The vitality of *Norton* has not been diminished by subsequent de-

cisions of this Court such as *Portland Cement* and *Scripto*.

Transaction privilege taxes are imposed by the laws of Arizona as follows:

A.R.S., §42-1308.

"A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * * * * * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1."

A.R.S., §42-1309.

"A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities,

and in the amounts to be determined by the application of rates against values; gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§42-1310 through 42-1315."

A.R.S. §42-1312.

"A. The tax imposed by subsection A of §42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. * * * ".

The Court will bear in mind that we are not here concerned with a sales tax, a use tax, or a tax upon the privilege of engaging in the business of soliciting orders, assembling machinery, or any activity other than engaging in the business of selling tangible personal property at retail. In *Arizona State Tax Commission v. Ensign*, 75 Ariz. 220, 254 P. 2d 1029 (1953) the Supreme Court of Arizona said:

"The tax imposed by the act is not a sales tax as such but is a tax upon the *privilege of engaging in business* measured by the amount or value of business done."

There are no provisions in the law which permit apportionment of the tax where sales activities are carried on within and without the state of Arizona.

In this action it is not suggested that Respondent's activities in the State of Arizona are other than exclusively in interstate commerce. It must therefore

be the position of Petitioner that Respondent can be subjected to an unapportioned tax on gross receipts as a condition to exercising the privilege of conducting exclusively interstate activities within the state of Arizona. This is not the law as established by this Court. *Portland Cement* involved a State income tax levied upon that portion of the foreign corporation's net income earned from and fairly apportioned to business activities in the State which were exclusively in furtherance of interstate commerce. This Court, in upholding the validity of the tax, stated:

> "Moreover, it is beyond dispute that a state may not lay a tax on the 'privilege' of engaging in interstate commerce, Specter Motor Service Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951). * * *
>
> The levies are not privilege taxes based on the right to carry on business in the taxing state. The states are left to collect only through ordinary means. The tax, therefore, is "not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce." * * *
>
> This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share." (358 U. S. 458, 462)

Even if the incidence of the tax involved in this action—the privilege of engaging in business—were ignored, and even if measuring the tax by sales to Arizona customers were somehow deemed to be an acceptable "apportionment", the instant case would be clearly distinguishable from *Portland Cement*. The activities within the state, which in *Portland Cement* were

deemed to "form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction'," are lacking in the instant case.

Scripto is of no comfort to Petitioner. It involved a Florida use tax. Arizona also has a use tax which is complimentary to the transaction privilege tax with which we are here concerned. *A.R.S.*, §42-1401, et seq. The tax—2% of the purchase price—is imposed upon the use or consumption in the state of tangible personal property purchased from a retailer where the proceeds of the sale are not subject to the transaction privilege tax. Persons storing, using or consuming such property are liable for the tax. The retailer is required to collect the tax from the purchaser and remit the same to the State Tax Commission. *A.R.S.*, §§42-1408, 42-1410, 42-1411 and 42-1412. On the basis of *Scripto*, Petitioner could insist upon Respondent's collecting from its Arizona customers the use tax applicable to cotton gins purchased by them and remitting the same to Petitioner, were it not for the fact (totally unrelated to the *power* to tax) that cotton gins happen to fall within an exemption contained in *A.R.S.*, §42-1409, which reads in part as follows:

> "The tax levied by this article does not apply to the storage, use or consumption in this state of the following described tangible personal property: * * *
>
> 8. Tangible personal property in the quantities and of the specifications, including date of delivery, required by the purchaser, which, at the time of purchase, was not available for purchase from an established place of business within this state which was engaged in the sale, from stocks within the state, of

property of the same general specifications in the regular course of business."

The significance of the Arizona use tax, in relation to this case and *Scripto,* is this: If it desired to exercise its power to do so, the State of Arizona could collect taxes from Respondent measured by the amount of its sales to Arizona customers merely by eliminating the exemption above quoted. There is no valid reason for this Court to allow the State of Arizona to reach the same result by discarding established constitutional principles.

CONCLUSION

In this action the trial court found as a matter of fact that Respondent's activities in the State of Arizona were interstate in nature and not associated with any local business being conducted by it in the State of Arizona; that Respondent did not elect to localize itself in the Arizona market with the advantages of a retail outlet in the State or channel business through a local outlet to gain the advantage of a local business. The Supreme Court of the State of Arizona did not question the Findings of the trial Court. To the contrary, the Supreme Court of Arizona reiterated and confirmed the Findings of the trial Court. In *Norton Company v. Department of Revenue, supra,* this Court stated:

"Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we

will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

We respectfully submit that the findings of the trial court were supported by substantial evidence, the stipulation of the parties and the depositions of two witnesses.

By its Rule 19, this Court has indicated the character of reasons which will be considered in acting upon a Petition For Writ of Certiorari, including:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

We submit that the federal question involved herein was determined by the Supreme Court of the State of Arizona in accordance with applicable decisions of this Court—certainly, in accordance with *Norton Company vs. Department of Revenue*, *supra*.

For whatever it may be worth, we note that the factual situation presented herein offers less reason to grant certiorari than was offered in *United Piece Dye Works v. Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 685, aff'd. 307 N. Y. 780, 121 N. E. 2d 617; remittitur amd. 307 N. Y. 836, 122 N. E. 2d 329; Cert. den. 348 U. S. 916, 99 L. Ed. 718, 75 S. Ct. 298, and in *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100; Cert. den. 352 U. S. 952, 1 L. Ed. 2d 243, 77 S. Ct. 326.

We respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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